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January 11, 2001

Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 204 B  
Washington, D.C. 20554

**Re: MDS America, Incorporated**  
***Ex Parte* Presentation, ET Docket No. 98-206**

Dear Ms. Salas:

Pursuant to section 1.1206 of the Commission's Rules, MDS America, Incorporated ("MDS America"), through its undersigned counsel, writes to report an *ex parte* meeting with Commission staff in the above-referenced docket. On January 10, 2002, Kirk Kirkpatrick, President and CEO of MDS America and Helen Disenhaus and Nancy Killien Spooner of Swidler Berlin Shereff Friedman met with Bryan Tramont, Senior Legal Advisor to Commissioner Abernathy.

MDS America's representatives discussed the importance of technology-neutral rules for Multichannel Video Distribution and Data Service ("MVDDS"), particularly given the economics of deployment in rural areas. Because small, restricted coverage areas will not prove to be economically feasible for any MVDDS provider, even if they receive the spectrum for free, it is important that the Commission's MVDDS rules do not circumscribe cell size for rural systems through technical requirements that are modeled after a particular MVDDS technology. MDS America provided Mr. Tramont with a copy of its December 4, 2001, *ex parte* filing in the above-referenced docket, which addresses this issue.

The group discussed the Commission's obligation to auction spectrum for which mutually exclusive applications have been filed, in accordance with Section 309(j) of the Communications Act, 47 U.S.C. § 309(j). MDS America also provided Mr. Tramont with a bullet point summary identifying the reasons why the LOCAL TV Act presents no bar to auctions. A copy of this bullet point summary is attached to this letter. Mr. Tramont also received a copy of MDS America's November 15, 2001, *ex parte* filing in this proceeding, which also discusses the role of the LOCAL TV Act with respect to MVDDS.

MDS America reiterated its position that MVDDS mitigation measures should not encompass visits to Direct Broadcast Satellite ("DBS") customer sites, as previously suggested by Northpoint. MVDDS systems should inherently avoid causing harmful interference to DBS

operations, and DBS carriers should not be expected to provide competitors with sensitive information (such as names and addresses of customers). The group discussed various possible mitigation solutions, including the potential for economic compensation for injured parties. MDS America emphasized, however, that just as DBS providers should not be placed in the position of revealing proprietary information to competitors, MVDDS providers likewise should not be placed in the position of being "nickel-and-dimed" over false claims of harmful interference.

MDS America also provided Mr. Tramont with a copy of MDS America's December 10, 2001, *ex parte* filing, responding to the DBS providers' proposal that MVDDS be moved to the CARS band. MDS America briefly outlined its position contained in that filing. Mr. Kirkpatrick set forth MDS America's view that it welcomes additional spectrum for MVDDS, but is opposed to any delay in allocating the 12.2-12.7 GHz band to MVDDS.

Because the MDS America *ex parte* filings of November 15, 2001, December 4, 2001, and December 10, 2001, referenced above and provided to Mr. Tramont, have already been made part of this docket, additional copies are not attached hereto. Please date-stamp the extra copy of this filing and return it in the enclosed self-addressed, stamped envelope.

Respectfully submitted,

A handwritten signature in cursive script that reads "Nancy Killien Spooner".

Nancy Killien Spooner  
Counsel for MDS America, Incorporated

Enclosures

cc: Kirk Kirkpatrick  
Helen Disenhaus

# MDS America, Incorporated

## FCC Should Promulgate Technology-Agnostic MVDDS Rules

### FCC Should Not Allow DBS Providers' CARS Band Proposal to Delay MVDDS Decision

## LOCAL TV Act Does Not Limit MVDDS Application Process

- ◆ Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), mandates auctions for mutually exclusive applications. ORBIT Act bar to auctions limited to international/global satellite services.
- ◆ LOCAL TV Act directs FCC only to “provide for an independent technical demonstration” for entities with terrestrial service applications on file with the FCC, to determine whether such operations would cause harmful interference to DBS.
- ◆ LOCAL TV Act **silent** on nature of tests to be conducted, what actions FCC should take if test results are favorable, whether testing should be precondition for future applicants, whether FCC should or should not auction 12 GHz terrestrial spectrum.
  - ◆ No mention of application deadlines, no cut-off dates set for application process. 60-day window mentioned in 1012(b) to complete the technical demonstration for pending applications, but that timeframe does not purport to govern application process.
  - ◆ LOCAL TV Act does not mention future applicants, only pending applications. Presumably, these are the non-conforming, unsolicited terrestrial service applications submitted by Northpoint and others pursuant to the NGSO (satellite service) Ku band public notice of Nov. 2, 1998. The FCC has never accepted these applications for filing.
    - ◆ **MDS America asked FCC staff whether it could file an application. MDS America also asked the FCC if it could participate in the MITRE tests, and offered to pay the costs. MDS America was informed by FCC that there was no need to file an application, as a filing window had not yet been established, and FCC's lack of funds precluded participation in the MITRE tests.**
- ◆ LOCAL TV Act does not mention auctions or § 309(j) of the Communications Act.
- ◆ Standard statutory interpretation bars expanded view of LOCAL TV Act:
  - ◆ Plain language must govern—application deadlines, qualification of future applicants, and inapplicability of auctions cannot be read into the LOCAL TV Act.
  - ◆ Draft amendments circulating with members of Congress, presumably at the behest of Northpoint (because no other directly interested parties in this docket support Northpoint receiving free spectrum) specifically include the language “notwithstanding” § 309(j) of Communications Act.
  - ◆ MDS America has, on its own initiative, conducted demonstrations of its technology with the assistance of LCC International, an internationally-respected, independent RF engineering firm. LCC International's report demonstrates that MDS America's technology does not cause harmful interference to DBS operations and can co-exist.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11<sup>th</sup> day of January, 2002, a true and correct copy of the foregoing was served via e-mail (denoted by \*) or first class United States mail, postage prepaid, on the following individuals.

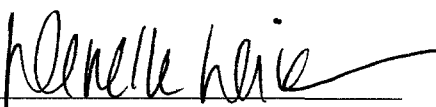
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Denelle Dixon